No. 14266

IN THE

United States
Court of Appeals
For the Ninth Circuit

BERNARD BLOCH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

Brief Resisting Appeal from the United States District Court for the Judicial District of Arizona To the United States Court of Appeals For the Ninth Circuit

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JURISDICTIONAL STATEMENT

The Appellant has stated certain facts relating to the jurisdiction of the courts, above mentioned. A regularly constituted grand jury, in due course of their considerations, found an indictment against Appellant, and returned a true bill which was filed on the 28th day of May, 1953.

Pursuant to Appellant's statement of jurisdictional matters, and the above reference to the grand jury, regularly constituted, of the Judicial District of Arizona, the United States Court for the Judicial District

of Arizona has jurisdiction hereof under *Title 18, United States Code, Section 3231,* and this court has jurisdiction under *Title 28, United States Code, Section 1291.*

THEORIES OF PROSECUTION AND DEFENSE

Appellee established the amount of unreported income in this case by the indirect method known as the "bank deposit method." To support such method, Appellee proved that the Appellant's records did not reflect his true receipts from medical practice, and proved several substantial receipts which were not reflected in his books of account. Appellant made no effort to dispute the Government's allegation as to the amount of unreported income, but apparently based his defense on an attempt to show that the unreported income was not wilfully omitted from his return.

STATEMENT OF FACTS

The issues here seem to be principally legal and not factual. Appellant's "Statement of the Case" (Appellant's Brief pp. 2-3-4) contains oniy two references to *Transcript of Record.* Many of the assertions therein, specifically, could and can be substantiated by reference to the *Transcript of Record.* That many of those assertions can not be substantiated, to the best of our recollection, by reference to *Transcript of Record,* seems not so important as is the fact that the "Statement of the Case," above mentioned, is principally exculpatory to the Appellant. It seems, in great measure, that the general tenor of the "Statement of the Case" is contradicted by the verdict of the jury, ". . . guilty as charged in Count II of the indictment. . ." (T.R. *pp. 16, 17). For this court's convenience the

*Transcript of Record, C. A. #14266.

following Statement of Facts, with references to *Transcript of Record,* are submitted as proving the *corpus delecti* of Appellant-Defendant's *Attempted Income Tax Evasion,* a violation of *Title 26, United States Code, Section 145(b)* on his tax year 1948; and as proving a prima facie case of attempted evasion for the tax year 1947.

Appellant had maintained two sets of records of receipts (T.R. p. 161) for his tax years 1947 and 1948. One set of records reflected receipts of less than one-half that which was shown by the second set (T.R. pp. 171, 174). The agent, Mr. Jack G. Williams, testified that he determined that the receipts reported for the year 1947 were those shown by the first set of records (Exhibit 11; T.R. p. 178); and that for the year 1948 he could not definitely determine that the first set of records was the basis for the receipts reported on the return but that in his opinion such appeared to be true (T.R. pp. 180, 181).

Appellee called seven witnesses who testified as to specific items of unreported income: Witnesses: Bayless (T.R. p. 135, *et seq.*), Chisholm: Gnau: Melluzzo: Ransom: Dodge: Zumstein. Bayless, a representative of the Industrial Commission testified that the agency had paid a total of twenty checks to the defendant during the year 1948. (T.R. p. 135, *et seq.*). The agent testified that of those twenty payments only four were recorded in the first set of books and eleven were entered in the second set of books. Six of the payments were not entered in either record (T.R. pp. 163, 165). Similarly, the agent testified that of the payments to defendant Bloch made by witnesses Zumstein, Dodge, Ransom, and Chisholm—a total of nine payments—none were recorded in the first record book, which was used in computing the reported income (T.R. pp. 166 through 169).

Based upon such testimony that the defendant had not recorded such a large proportion of receipts and had not taken them into account on his income tax return; and because the defendant had maintained two sets of records of receipts, one of which was used in computing his reported income and the other reflecting receipts of at least twice as much in amount; the Appellee was entitled to disregard the records as being unreliable, and to compute income by an indirect method, i.e.; bank deposit basis.

For the year 1948, the receipts from medical practice as computed on the bank deposit basis was $16,220.55 (T.R. p. 190), as compared with receipts of $17,728.44 reflected by the second set of records (T.R. p. 174), and the medical receipts actually reported of $10,909.08 (T.R. p. 190). Similarly, the agent testified as to the tax deficiency that would result for the year 1948, if the second set of records were used in the computation, and such tax deficiency was even greater than that which resulted from the use of the bank deposit method (T.R. pp.203, 190).

Wilfulness was established by the testimony of several witnesses and by certain documentary evidence. The concurrent keeping of two records of receipts, widely varying in total amounts (T.R. pp. 62 through 70): Summary sheets used by the Appellant in computing his reported income were altered by him apparently, in a clumsy attempt to conceal change of amounts in units of even hundreds (T.R. pp. 176, 177). Appellant, during the investigation, first denied to the agent that he had any knowledge of the existence of the second set of records (T.R. p. 199) and denied that he had ever seen them before. Later, after being shown that many of the entries in the second set of records were his (T.R. p. 200, Appellant changed his story and stated that there was in fact a second set of records and

if he had used the wrong set in computing his income, it was merely a mistake (T.R. p. 201). The fact that Appellant admitted that real estate which he actually owned was held in the names of relatives so that he could defeat his creditors (T.R. pp. 194, 195) seems indicative of the Appellant's state of mind.

Appellant's specification No. III asserts error by reason of conflicting verdicts upon ". . . substantially the same facts . . ." and specification No. I asserts error in refusing Appellant's requested instruction No. 2 on "wilfulness." May we point out additional evidence of "wilfulness" in connection with Appellant's tax year 1948, which did not refer to tax year 1947 (this is not mentioned as inclusive of all additional evidence as to 1948), as follows:

Witness Daniel Mooney received information to make up Appellant's income tax return for the year 1947 (T.R. pp. 108, 111, 112), in March of 1948. This information he believed to be inadequate, and probable understatement was referred to Appellant (T.R. pp. 108, 109), who gave additional information that made up a loss of "five or six thousand dollars, at least." (T.R. p. 109). (c.f. Government's Exhibit #1.) This return was filed March 15, 1948. Appellant had made an estimate of his income for 1948 and either then, or subsequently in said year, made prepayments aggregating $300.00 on said estimate (T.R. p. 39). Appellant then hired another person to consolidate his records, of receipts and disbursements, for rendering income tax returns for his tax year 1948 (T.R. p. 230); Helen Zimberg, a member of his family (T.R. pp. 250, 251), whose lack of education (T.R. p. 251) is apparent in *Transcript of Record* and must have been known, then, to Appellant (T.R. p. 251). When the 1948 income tax return was filed, Appellant paid $9.00

(in addition to prepayment on estimate for said year) (T.R. p. 39, c.f. Exhibit #2), and he paid an aggregate of only $17.00 more for 1948 than he had for 1947 (T.R. pp. 39, 40).

ISSUES ON APPEAL

(References to Transcript of Record relied upon by Appellee)

1. Appellee urges that Honorable District Court's instructions on "wilfulness" are proper; that the Trial Court did not err in refusal to give Appellant's requested instruction No. 2: Appellee relies upon, and the court's instructions on wilfulness are contained in, *Transcript of Record, pages 409, 410, 411 and 415:* Appellant's requested instruction No. 2, which was refused by the court, is contained on *pages 18 and 19 of Transcript of Record;* and Appellee urges that said instruction is not a proper statement of law.

2. Appellee urges that Appellant received a fair trial: Appellee urges that no improper nor prejudicial evidence was admitted against Appellant: Apellee relies upon *pages 222, 223, 224, 292, 293, 294, 295, 300 through 310, and pages 376 through 386 of Transcript of Record:* Appellee urges that no motion for mistrial was warranted nor made *(Ibid.):* Appellee urges that no instruction to disregard allegedly irrelevant questions tending toward the pre-judicial was requested *(Ibid.)* but that the court, upon his own volition, gave such instructions as, in the context and the atmosphere of the courtroom, he felt necessary to prevent prejudice *(Ibid.).*

3. Appellee urges specification of error No. III, alleging that "The jury brought in conflicting verdicts based on what were substantially the same fact situa-

tions in Counts I and II of the indictment. . ." does not constitute error.

4. Appellee urges that no error was committed by the Honorable Trial Court in the trial of the matter now on appeal, and that particularly no reversible error was committed.

Appellee relies upon the pages of *Transcript of Record* referred to above in the numbered paragraphs, to resist this appeal, and for the convenience of the court, upon the references to *Transcript of Record* in the *Statement of Facts,* above set forth, as proof of the *corpus delecti* upon which this case was tried and conviction had.

APPELLEE'S ARGUMENT ON SPECIFICATION I

Proposition of Law No. 1: Requested charges of defendant which were erroneous or misleading or if given would have unduly burdened the charge with unnecessary and confusing details, were properly refused.

Appellant's requested instruction No. 2, (T.R. pp. 18, 19) is not a faithful reproduction of the charge given in *Gaunt v. United States, infra.* It will be noted that the last part of the last sentence of the instruction as given in that case, *infra, at page 291,* has been deleted. It seems notable that the above *Proposition of Law No. 1* is an exact reproduction of syllabus No. 11, *Criminal Law, Wests Key No. 830,* from the same case.

Gaunt v. United States, U.S.C.A. 1st Cir., July, 1950, 184 Fed. 2d 284 (Please see pp. 286 and 291)

Furthermore, the *Gaunt case* is not in point with the case at bar. Assuming, for the moment, however, that it is in point, even then Appellant's requested instruc-

tion No. 2 is not the instruction that was given in the *Gaunt case.* The excision of the last part of the last sentence of the instruction in the *Gaunt case,* we submit, makes the requested instruction an erroneous statement of law. This, we submit, is by reason that it infers that a "failure to secure a lawyer or accountant" is a defense in any income tax evasion case; this is by reason of the appearance of the word ". . . certainly . . . ."

Within the proposition of law, first above stated, therefore, the requested instruction is an erroneous statement of law: More particularly the requested instruction is a "misleading" statement: even more particularly the giving of such instructions would have burdened the charge with ". . . unnecessary and confusing detail . . ."; Bureau of Internal Revenue Regulations were not involved; errors of law were not involved; the instruction is not appropriate to the facts that had been proved at the trial.

Timell v. United States, U.S.C.A. 9th Cir., May, 1925, 5 Fed. 2d 901

c.f. U.S. v. McCormick, U.S.C.A. 2nd Cir., December, 1933, 67 Fed. 2d 867, cert. denied, 291 U.S. 662

It was not error to refuse to give defendant's requested instruction No. 2.

Proposition of Law No. 2: Where instructions to the jury fully and fairly inform the jury that "wilfulness" is an essential part of the proof of the crime alleged, and that "wilfulness" is to be distinguished from "mistakeness", or "carelessness", and that an act to be done "wilfully" must be an act that is done with a "bad purpose", then a jury is properly instructed upon the element of "wilfulness" for the purpose of a trial for attempted income tax evasion under *Section 145(b) of the Internal Revenue Code.*

We know of no case which holds to the contrary of the above proposition of law. For the court's convenience we cite a few cases which are directed to this particular question.

United States v. Murdock, cert. to the 7th Cir., October term, 1933, 290 U.S. 389

United States v. McCormick, U.S.C.A. 2nd Cir., December, 1933, 67 Fed. 2d 867, at p. 870

Sullivan v. United States, U.S.C.A. 9th Cir., February, 1935, 75 Fed. 2d 622

For comparison:

United States v. Norris, U.S.C.A. 2nd Cir., April, 1953, 205 Fed. 2d 828

For the court's convenience the following extracts from the Honorable Trial Court's instructions, in the case at bar, from *pages 407 through 420 of Transcript of Record,* are set out below:

1. ". . . You must be convinced both that a tax was due and owing in addition to that declared by the defendant, and that the defendant wilfully attempted to evade and defeat such tax. . ."
(T.R. 409)

2. ". . . The gist of the crime consists in wilfully attempting to escape the tax. The attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws, which it was the duty of the defendant to pay to the Government.

   The attempt must be wilful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant."
(T.R. 409, 410).

3. ". . . The Government must not only prove that defendant did some act which tended to conceal

his true tax liability, but must also prove that this was done wilfully.

Wilfully in the statute, which makes a wilful attempt to evade taxes a crime, refers to (479) the state of mind in which the act of evasion was done.

It includes several states of mind, any one of which may be the wilfulness to make up the crime. Wilfulness includes doing an act with a bad purpose.

It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with careless disregard for for whether or not one has the right so to act."

(T.R. 410)

4. ". . . In making your decision as to whether or not the acts tending to evade tax liability were wilful, you may consider all of the circumstances of the case."

(T. R. 411)

5. ". . . Under the indictment in this case the accusation is made that the defendant acted wilfully, that is, with a bad purpose, and not merely mistakenly or carelessly.

Before finding him guilty, you must be satisfied from the evidence that any omissions on his part were made wilfully, and with intent to evade and defeat taxes due for the calendar years 1947 and 1948 to the Government."

(T.R. 415)

It is submitted that the giving of the above instructions on the subject matter "wilfulness", in the case at bar, constituted neither an error in omission nor an error in commission.

APPELLEE'S ARGUMENT ON SPECIFICATION II

Appellee does not reproach those who have the expectation that government counsel be like Caesar's wife; nor claim credit that trial court's record, in the instant case, is without blemish; nor does Appellee seek to make excuses; nor seek to justify, on appeal, by references to matters outside the record. May we point out, however, that government counsel could not, before the jury, make excuses, nor justify by references to matters not within the record, nor seek to supplement the record.

Appellant claims the questions called for irrelevant evidence (Appellant's Brief, page 9). We submit, the questions asked were relevant:

For example:

(1) The Appellant put his character into evidence; he did this by testifying, and particularly, to mention one facet only, by testifying as follows:

"...Q. Now, did you set up a skating rink in Sunnyslope?

A. Yes, I did.

Q. Where did you set that up?

A. At the time I was president of the Junior Chamber of Commerce, we had a juvenile delinquency problem, and after getting together in various meetings, we found that the only way to curb that problem was to put up a skating rink, which was done in other communities.

Q. Did the Junior Chamber of Commerce of Sunnyslope have the money to build this rink?

A. No, they didn't.

Q. Did you do this as a part of a project for the Junior Chamber of Commerce?

A. Yes, I did.

Q. Did you use your own money in setting this rink up?

A. Yes, I did.

Q. Was the use of the rink restricted to the juvenile group there?

A. That is right. It was not restricted to them, but it helped curb the problem we sought to alleviate.

Q. Was this intended as a profit venture on your part? (351)

A. No, it was not.

Q. Did it actually turn out as a profit venture?

A. No. We closed it down. It is closed now, and I took a loss on it. . . ."

(Transcript of Record, page 309)

The Honorable Trial Court's rulings, and very definite instructions to the jury to disregard questions set out by Appellant, were for the purpose of preventing possible prejudice, and were not because the evidence would have been irrelevant.

(2) Appellant also put into issue the question of his expenditures, endeavoring to justify the expenditures during his tax years 1947 and 1948, as being within his income as reported in Government's Exhibits 1 and 2 (plus certain loans) (T.R. pp. 222, 223, 224, and 300 through 304 and 329 through 335).

Mr. Church: With the permission of counsel for the prosecution, if there will be no objection to taking this information out of line, once it is (243) prepared, I would like to ask permission to have that computed on that basis. Would that be all right?

Mr. Thurtle: Yes.

Q. (By Mr. Church): Then would you mind doing the same thing for 1948?

A. In other words - - -

Q. If you had allowed the $4,000 that Dr. Bloch contends that he secured from his parents. You said that he told you he had received $4,000, and you took half of that, is that correct, to be fair?

(Transcript of Record, page 223)

and:

Q. Would it put you to too much trouble to compute that on the basis of the $4,000?

A. You would like me to compute it on the basis of $4,000 allowed for each year?

Q. Yes, that is right.

A. Sure, I would be glad to compute it for you.

(Transcript of Record, page 225)

c.f. Transcript of Record, pp. 300 through 304

The questions concerning the expenditures, so seriously viewed as irrelevant, were in fact relevant; they were not required to be answered because the court was concerned that they might lead to prejudice.

Likewise, the other questions, in the context of each thereof, refers to either: ". . . failure to report fees . . ." (top line page 383 T.R.), or to prior statements of Appellant made under oath. It is to be recalled that Appellant's character, including that for veracity, was in issue. The questions were relevant; they were just also dangerous. And the court prevented damage or blemish, upon the record, from that danger. Any explanation or showing by government counsel, in front of the jury, was impossible. (c.f. *Argument on Specification III, Proposition of Law No. 7, infra.*)

Proposition of Law No. 3: Declaration of mistrial is largely within the discretion of the trial court.

Not claiming any unusual scope to the above Proposi- of Law, as it may apply to the case at bar, Appellee cites only two general cases.

Holmgren v. United States, October term, 1909, 217 U.S. 509, at p. 521

Malatkoski and Seigel v. United States, U.S.C.A. 1st Cir., January, 1950, 179 Fed. 2d 905, at pp. 912, 913, 914.

Proposition of Law No. 4: Where no motion for mistrial is made, and defendant does not request justification of questions, after questionable interrogation on cross-examination of witness who has testified to defendant's good character, and trial court sustains objection and instructs jury to disregard questions, no error is committed, and mistrial or a new trial is not warranted.

Again, not claiming any unusual scope to the above Proposition of Law, as it applies to the case at bar, may Appellee cite only a few cases:

Nichelson v. United States, October term, 1948, 335 U.S. 469

Massenberg v. United States, U.S.C.A. 4th Cir., April, 1927, 19 Fed. 2d 62

c. f. *Gaunt v. United States, supra*

A salutary reason for both the Proposition of Law above numbered 3, and the Proposition of Law above numbered 4, is that the most immediate opportunity for the appreciation of an irregularity or irregularities at trial is in the trial judge who observed them, in their context, and in the atmosphere of the courtroom. Likewise, if Appellant, who also observed, that occurrence which is now urged as an irregularity or irregularities,

in its context in the courtroom, had appreciated any particular or unusual affect from the occurrence, he should have and would have made a motion for mistrial. Appellant's failure then to move for a mistrial and now exploring an alleged unusual affect from the occurrence, seems a little like—eating the cake—and —having it too—but, what seems more important is that he did not give the Honorable Trial Court an opportunity to consider his secret weapon, the possibility of an unusual affect, or prejudice, from the occurrence.

We hesitate to take up the court's time with an analysis of each of the cases cited by Appellant. Appellee hopes to understand each of them, and to convey a true understanding that each of them is not in point, with the case at bar, and that none of them is of compelling force in the consideration of the case at bar.

Upon these general principles Appellee urges that the Honorable Trial Court committed no error in his treatment of questions directed to Appellant, on cross-examination, and to the other named witness, which have been taken out of context and placed in the "box score" in Appellant's brief.

Proposition of Law No. 5: In criminal case upon charge of attempted income tax evasion, where bank deposit and expenditure method of proving unreported income is justified, and where defendant takes the stand to testify, putting his character in issue, and where he and other witnesses testify to his good character, and where defendant seeks to prove bank deposits and expenditures were from money loaned to him, it is not prejudicial to cross examine defendant upon the amounts of his expenditures to ladies who are living with him and it is not prejudicial to cross examine him upon his good character.

This general principle does not seem to be questioned. It is restated as follows:

> "Section 58. Same: Prosecution may Rebut. After a defendant has attempted to show his good character in his own aid *prosecution may in rebuttal* offer as evidence his bad character. The true reason for this seems to be, not any relaxation of the principle just mentioned, i.e., not a permission to show the defendant's bad character, but a liberty to refute his claim that he has a good one. Otherwise a defendant, secure from refutations, would have too clear a license unscrupulously to impose a false character upon the tribunal. . . ."
>
> *Wigmore on Evidence, 3rd Edition, 1940, Vol. 1, Sec. 58*

The questions were relevant. The evidence sought might have been admitted within the confines of a fair trial. It was sought as proof of omitted income; as impeachment of the claim of good character of defendant; as impeachment of his claim of endeavoring to work for the good of juveniles; impeachment of his explanation of investment and expenditures within his reported income.

The Trial Court, in his earnest effort to afford defendant a fair trial, excluded the evidence, and in the presence of the jury criticized the questions and counsel. The defendant was afforded most ample consideration and protection.

We do not understand that this constitutes error.

APPELLEE'S ARGUMENT ON SPECIFICATION III

Proposition of Law No. 6: "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment."

The above Proposition of Law is quoted from the following case decided in the United States Supreme Court, in October term, 1931:

Dunn v. United States, 284 U.S. 390, at p. 393

We believe that this still is the law, and wish to point out to the court that, different from the case at bar, in the *Dunn case* the different verdicts were assumed to have been found upon the *same* evidence:

> "The most that can be said in such cases is that the verdict shows that either in the acquittal or conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity."

Dunn v. United States, Ibid.

c.f. *Steckler v. United States, U.S.C.A. 2nd Cir., April, 1925, 7 Fed. 2d 59, at p. 60*

c.f. *Sullivan v. United States, supra*

It is submitted that any inconsistency that is to be found in the verdict is not legal cause for the granting of a new trial. It is submitted that there was no error in the refusal of the trial court to grant a new trial.

Proposition of Law No. 7: "Recommendation of leniency" appended by jury to a verdict of guilty does not constitute grounds for mistrial nor the granting of a motion for new trial.

We respectfully submit that in the face of what appears to be ample evidence of attempted income tax evasion, the fact that the jury appended the words, "recommend leniency" to the verdict does not necessarily evidence a prejudice against the defendant. Appealing considerations seem to indicate the converse.

Dunn v. United States, op. cit., supra

Sullivan v. United States, supra

It is submitted that the court did not err in not granting a mistrial upon his own volition, nor did he err in refusing to grant motion for new trial.

CONCLUSION

It is submitted that the evidence of attempted income tax evasion, as to Appellant's tax year 1948, was abundant; it is submitted that the evidence of income tax evasion for 1947 was extensive; it is submitted that the Appellant was given every consideration and protection, by the trial court in the trial of this case. Appellee urges that no error was committed in the trial of the case, and that more particularly, in view of the ample evidence of guilt, no reversible error was committed.

Respectfully submitted,

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